[redacted]

In The

Supreme Court of the United States

October Term, 1991

No. 91-538

FORSYTH COUNTY, GEORGIA,

Petitioner,

vs.

THE NATIONALIST MOVEMENT,

Respondent.

On Writ Of Certiorari To The
United States Court Of Appeals
For The Eleventh Circuit

MOTION OF PUBLIC CITIZEN FOR LEAVE TO FILE AN *AMICUS CURIAE* BRIEF

Public Citizen respectfully moves this Court, pursuant to Rule 37.4, for leave to file a brief as *amicus curiae* in support of respondent the Nationalist Movement (the "Movement"). Consent to file this brief was granted by petitioner Forsyth County but withheld by the Movement.

Public Citizen is a non-profit, consumer advocacy organization with over 100,000 members nationwide. Public Citizen often takes controversial positions on matters of public policy, and it is concerned that if Forsyth County's fee provision is sustained by this Court, similar fees could be imposed on Public Citizen and other advocacy organizations. Imposition of such fees would

burden Public Citizen's ability to engage in express advocacy activities and to solicit contributions.

Moreover, Public Citizen, through its Litigation Group, has on occasion represented activist organizations whose messages are at odds with the views of mainstream America. These groups take positions on hotly disputed matters of public policy, ranging from environmental and energy matters to issues of social welfare and the rights of the homeless and underprivileged.

Public Citizen seeks leave to file the accompanying brief because this case threatens the ability of advocacy organizations such as Public Citizen, and the organizations it represents, to continue to use traditional public forums to bring their messages to the public, especially where that activity is intertwined with fund-raising. The Forsyth County ordinance permits the imposition of a fee of up to $1,000 for a license to hold a rally in a street or a park. If upheld, similarly high fees could be charged in connection with solicitation activities conducted by advocacy groups. The result would be intolerable. Many advocacy organizations would be hard-pressed to raise even a $100 fee for the privilege of exercising their free speech rights. Worse, if the Forsyth County fee system is upheld, other local governments will surely raise their fees as well, adding to the oppressive burdens faced by advocacy organizations.

Because respondent styles itself a "pro-majority" organization with a different view of the First Amendment than Public Citizen, Public Citizen's position would not otherwise be presented for this Court's review.

Respectfully submitted,

Leslie A. Brueckner
David C. Vladeck
(Counsel of Record)
Alan B. Morrison

Public Citizen Litigation Group
2000 P Street, N.W.
Suite 700
Washington, D.C. 20036
(202) 833-3000

Attorneys for *Amicus Curiae*
Public Citizen

March 5, 1992

TABLE OF CONTENTS

TABLE OF AUTHORITIES

In The
Supreme Court of the United States
October Term, 1991

No. 91-538

FORSYTH COUNTY, GEORGIA,

Petitioner,

vs.

THE NATIONALIST MOVEMENT,

Respondent.

On Writ Of Certiorari To The
United States Court Of Appeals
For The Eleventh Circuit

BRIEF OF *AMICUS CURIAE* PUBLIC CITIZEN IN SUPPORT OF RESPONDENT

INTEREST OF PUBLIC CITIZEN

The interest of Public Citizen is set forth in the foregoing motion for leave to file this brief.

STATEMENT

This case arises out of the efforts of a group called the Nationalist Movement (the "Movement") to conduct a parade and rally in Forsyth County, Georgia. During the course of its negotiations with city and county officials over the time and place of the event, the Movement ran afoul of Forsyth County's recently

enacted parade ordinance, which permits imposition of a fee of up to $1,000 per day for each day that a parade or rally takes place. App. 28.[1] The ordinance specifically allows the amount of the fee to be "adjust[ed] . . . in order to meet the expense incident to the administration of the Ordinance and to the maintenance of public order in the matter licensed." *Id.* Thus, Forsyth County's ordinance permits imposition of a fee based on the amount of public disorder and unrest that an activity involving the communication of ideas is deemed likely to engender.

In this case, Forsyth County's Administrator "deliberately undervalued" the expenses incident to processing the Movement's application and assessed a fee of $100. Petitioner's Brief at 8-10. The Movement refused to pay the $100 fee and challenged Forsyth County's ordinance as violative of the First Amendment both on its face and as applied. App. 21-22. The district court rejected the Movement's challenge on both counts. App. 21. The *en banc* Eleventh Circuit reversed, concluding that the $1,000 fee provision was unconstitutional on its face. App. 47-48.

SUMMARY OF ARGUMENT

The Eleventh Circuit correctly held that Forsyth County's parade ordinance, which permits imposition of a license fee of up to $1,000, violates the First Amendment. That ruling is consistent with this Court's prior decisions in *Cox v. State of New Hampshire*, 312 U.S. 569 (1941), and *Murdock v. Pennsylvania*, 319 U.S. 105 (1943), which, taken together, allow such fees only to defray administrative expenses associated with policing the event *and* only if they are "nominal." Forsyth County's ordinance plainly fails this test, as it permits the imposition of a fee of up to $1,000 -- an amount which even Forsyth County does not claim is nominal.

If, however, *Cox* can be read as permitting this fee, that decision should be overruled. By imposing substantial fees based on the anticipated costs of policing an event, Forsyth County's

[1] Citations to "App." are to the Appendix to the Petition for Writ of Certiorari.

ordinance unconstitutionally levees a tax on the kind of core political speech that lies at the heart of the First Amendment.

ARGUMENT

THE DECISION STRIKING DOWN FORSYTH COUNTY'S FEE PROVISION SHOULD BE UPHELD AS IT IS COMPELLED BY THIS COURT'S FIRST AMENDMENT JURISPRUDENCE.

The issue in this case is whether Forsyth County may impose a substantial charge for the exercise of First Amendment rights. The ordinance at issue permits imposition of a fee of up to $1,000 as a precondition for a group to engage in expressive activity in a traditional public forum. The actual amount of the charge in any given case is based on the County's prediction of the "expense incident to the administration of the Ordinance *and to the maintenance of public order in the matter licensed*." App. 28 (emphasis added). Thus, the more provocative the speech, the greater the fee. As a result, if Forsyth County has its way, free speech will no longer be "free," despite the First Amendment.

This Court has recognized that freedom of speech is "available to all, not merely to those who can pay their own way." *Murdock*, 319 U.S. at 111. Forsyth County's ordinance flies in the face of this long-standing principal by charging what amounts to a "user fee" for the First Amendment. Even worse, the ordinance is designed to impose a disproportionate burden on the type of speech that is at the core of First Amendment values -- that which "induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger." *Terminiello v. Chicago*, 337 U.S. 1, 4 (1948).

Forsyth County argues, however, that its licensing scheme is permissible under *Cox*. That case involved an ordinance that permitted imposition of a license fee for the use of public streets for parades or processions of "a sum not more than three hundred dollars." 312 U.S. at 571 n.1. The Court upheld a conviction for failure to obtain a permit against a First Amendment challenge, stating that the Constitution does not prohibit imposition of a

charge to defray the expenses incident to maintenance of the public order. *Id.* at 577. *Cox* did not address, however, whether the amount of the fee could be adjusted based on the content of the speech or the response it was likely to provoke.

Murdock, decided two years later, clarified *Cox*. *Murdock* involved a City ordinance requiring all persons who solicited orders for any kind of merchandise to procure a license at a specified cost ($1.50 for one day; $7.00 for one week; $12.00 for two weeks; and $20.00 for three weeks). In holding that the ordinance violated the First Amendment, the Court wrote that the permitted charge "*is not a nominal fee* imposed as a regulatory measure to defray the expenses of policing the activities in question." 319 U.S. at 113-14 (emphasis added). Later in the opinion, the Court reiterated that "*the fee is not a nominal one*, imposed as a regulatory measure and calculated to defray the expense of protecting those on the streets and at home against the abuses of solicitors." *Id.* at 116 (emphasis added).

Thus, *Cox* and *Murdock*, read together, stand for the proposition that license fees assessed against protected First Amendment conduct must both be directly related to administrative expenses that are required to police the event *and* be "nominal." Any other reading renders superfluous the dual references in *Murdock* to "nominal" fees. In addition, any other reading makes meaningless *Murdock*'s admonition that "[f]reedom of speech, freedom of press, freedom of religion is available to all, *not merely to those who can pay their own way*." 319 U.S. at 111 (emphasis added). Nor is there anything in either decision to suggest that a fee provision that is directly keyed to the content of the proposed speech, and to the response it is likely to provoke, is constitutionally permissible; indeed, as discussed below, this Court has repeatedly struck down such content-based restrictions as violative of the First Amendment.

It is worth emphasizing at the outset that Forsyth County's ordinance regulates speech in what has been regarded as quintessential public forums -- city streets, sidewalks, and parks. *See United States v. Grace*, 461 U.S. 171, 177 (1983). "In such places, the government's ability to permissibly restrict expressive conduct

is very limited: the government may enforce reasonable time, place, and manner regulations as long as the restrictions 'are content neutral, are narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication.'" *Id.* at 177 (quoting *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983)).

The County urges this Court to uphold its ordinance as a legitimate, content-neutral regulation of speech. In so arguing, it ignores the fact that the ordinance imposes a disproportionate burden on one type of speech, *i.e.*, controversial speech that, in the view of Forsyth County's Administrator, is likely to invite dispute and require extra police protection. In light of this fact, it is clear that the burdens imposed by the Forsyth County ordinance are anything but content-neutral. In fact, the amount of fees charged are *directly* related to the content of the speakers' views. That being the case, the ordinance may only stand if it is "necessary to serve a compelling state interest and narrowly drawn to achieve that end." *Perry*, 460 U.S. at 45.

Numerous prior decisions of this Court hold that a state has no legitimate interest -- let alone a compelling one -- in suppressing provocative speech solely on the grounds that it is likely to provoke a violent reaction. For example, in *Terminiello v. City of Chicago*, 337 U.S. 1 (1948), the Court struck down an ordinance that imposed criminal liability on "all persons who shall make, aid, countenance or assist in making any improper noise, riot, disturbance, breach of the peace or diversion tending to a breach of the peace." The jury was instructed that the words "breach of the peace" included speech which "stirs the public to anger, invites dispute, brings about a condition of unrest, or creates a disturbance . . .." *Id.* at 4.

In striking down the ordinance, the Court emphasized, in language particularly relevant to this case, the special importance of the type of speech targeted by the ordinance:

> The right to speak freely and to promote diversity of ideas and programs is . . . one of the chief distinctions that sets us apart from totalitarian regimes. Accord-

> ingly a function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger. It may strike at prejudices and preconceptions and have profound unsettling effects as it presses for acceptance of an idea. That is why freedom of speech, though not absolute, . . . is nevertheless protected against censorship or punishment, unless shown likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance, or unrest.

Id. at 4 (citations omitted).

Terminiello vividly demonstrates the immense value this Court has traditionally placed on controversial speech. *Cf. Texas v. Johnson*, 491 U.S. 397 (1989). Nor is the decision an isolated one; to the contrary, this Court has announced, time and again, that states may not restrict communicative expression solely based on a fear of disruptive activity. *See, e.g., Gooding v. Wilson*, 405 U.S. 518, 519 (1972) (striking down statute making it a misdemeanor for any person, without provocation, to use "opprobrious words or abusive language tending to cause a breach of the peace"); *Brandenburg v. Ohio*, 395 U.S. 444, 449 (1969) (striking down statute that purported to punish "mere advocacy" of use of force); *Edwards v. South Carolina*, 372 U.S. 229, 237 (1963) (the First Amendment "does not permit a State to make criminal the peaceful expression of unpopular views").

In this case, Forsyth County's ordinance targets precisely the type of potentially disruptive speech that *Terminiello* deemed especially worthy of protection. Although the ordinance does not contain an outright prohibition on protected speech, it can have that effect by pricing poorly-funded groups, seeking to espouse an unpopular message, out of the advocacy market. This is the classic "heckler's veto," which has consistently been struck down as violative of First Amendment freedoms. *See, e.g., Terminiello, supra*. There is no legitimate rationale for, on the one hand, striking down outright prohibitions on disruptive speech while, on

the other hand, permitting financial restrictions that effectively prohibit controversial speech from certain speakers. *Cf. Lubin v. Parish*, 415 U.S. 709 (1974) (statute that required candidates to pay filing fee in order to have their names placed on an election ballot violates rights of expression and association guaranteed by First Amendment).

In short, there is no compelling state interest that justifies an ordinance, such as the present one, which burdens speech based on its potentially disruptive effect. Ordinances of this type could easily be applied to exclude civil rights organizations, homeless advocacy coalitions, and other poorly-financed groups from engaging in any public rallies. This is not a permissible result under the First Amendment.

Forsyth County defends its ordinance by arguing that, in the present case, it "deliberately undervalued" its expenses incurred in processing the Movement's application for a permit. *See* Petitioner's Brief at 30-31. For this reason, argues petitioner, "any concern that the content of the Movement's message resulted in an enhanced fee is groundless; in fact, the Administrator and the County bent over backwards in an effort to be as fair and equitable as [the ordinance] would permit." *Id.* at 30.

This argument, however, merely underscores the sort of abuses made possible by fee provisions of this type. Not only do such provisions effectively create a heckler's veto over protected speech, they permit government officials to pick and choose among their favorite causes by adjusting the amount of the fee charged in any given case. While there is no reason to believe that favoritism was at work in this case, there is absolutely nothing that prevents Forsyth County's licensing provision from being administered in a biased fashion. This Court should not sanction a scheme that invites favoritism and abuse in realms of protected First Amendment activity. *See FCC v. League of Women Voters of California*, 468 U.S. 364, 384 (1984) (statute that gave government officials the power to "limit discussion of controversial topics and thus to shape the agenda for public debates" condemned as "'the purest example of a "law abridging the freedom of speech, or of the press"'" (quoting *Consolidated Edison Co. v. Public Serv.*

Comm'n, 447 U.S. 530, 546 (1980) (Stevens, J., concurring)).

Forsyth County's "deliberate undervaluation" argument also undercuts its asserted rationale for enacting the ordinance. The County claims that its fee provision furthers the "significant government interest" of "protecting the public fisc and public order." Petitioner's Brief at 18. But the $100 fee assessed against the Movement admittedly did not even cover Forsyth County's costs in *processing* its application, let alone the expected cost of policing the Movement's demonstration and whatever counter-demonstrations the County might have anticipated (which the County did not bother to assess). Clearly, assessment of this fee, which petitioner concedes was not based on actual costs of any sort, would not protect the "public fisc" of Forsyth County in any meaningful sense.

The fee provision does, however, serve Forsyth County's financial interests in a more insidious fashion that directly infringes on the First Amendment. Petitioner admits that it enacted the ordinance "as a direct result of" two civil rights demonstrations led by Hosea Williams that, due to hostile counter-demonstrations, cost local and state government over $700,000 to police. Petitioner's Brief at 6. Even a fee of $1,000 (the maximum permitted by the ordinance) would not make a dent in a financial burden of this sort -- unless, that is, the group seeking a license was unable to pay the fee at all and thereby was prohibited from marching. Only this result would further Forsyth County's interest is protecting its public fisc. But this is precisely the result that is prohibited by the First Amendment. Under *Murdock*, only a fee that covers routine administrative expenses -- and nothing else -- is constitutionally permissible. And, if an organization is in fact impecunious, even that fee cannot stand as an obstacle to the exercise of First Amendment rights. Because Forsyth County's ordinance permits imposition of more than a nominal fee, and allows government officials to determine how much the fee should be based on the content of the proposed speech, the Eleventh Circuit's decision striking down the ordinance was entirely consistent with prior decisions in this area and should be upheld.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

Leslie A. Brueckner
David C. Vladeck
(Counsel of Record)
Alan B. Morrison

Public Citizen Litigation Group
2000 P Street, N.W.
Suite 700
Washington, D.C. 20036
(202) 833-3000

Attorneys for *Amicus Curiae*
Public Citizen

March 5, 1992